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15 UNITED STATES DISTRICT COURT  
 16 NORTHERN DISTRICT OF CALIFORNIA  
 17 OAKLAND DIVISION

18 LENSCRAFTERS, INC., and EYEXAM OF  
 19 CALIFORNIA, INC.,

20 Plaintiffs,

21 v.

22 LIBERTY MUTUAL FIRE INSURANCE  
 23 COMPANY; EXECUTIVE RISK SPECIALTY  
 24 INSURANCE COMPANY; UNITED STATES  
 FIRE INSURANCE COMPANY; MARKEL  
 AMERICAN INSURANCE COMPANY and  
 WESTCHESTER FIRE INSURANCE  
 COMPANY,

Defendants.

AND RELATED COUNTER AND CROSS-  
 ACTIONS

No. C07-02853 SBA

[Related Case No. C 04-01001 SBA]

**EXECUTIVE RISK SPECIALTY  
 INSURANCE COMPANY'S ANSWER  
 TO WESTCHESTER FIRE  
 INSURANCE COMPANY'S CROSS-  
 CLAIM**

25 Cross-Defendant Executive Risk Specialty Insurance Company ("ERSIC"), by and  
 26 through its counsel, answers Cross-Claimant Westchester Fire Insurance Company's  
 27 ("Westchester") Cross-Claim against ERSIC in this action, as follows:  
 28

1       1.    Paragraph 1 of the Cross-Claim purports to describe the relief sought by  
2 Westchester in this action, to which no response is required. To the extent any response is  
3 required, ERSIC denies the allegations.

4       2.    ERSIC admits the allegations in Paragraph 2 of the Cross-Claim.

5       3.    Upon information and belief, ERSIC admits the allegations in Paragraph 3 of the  
6 Cross-Claim.

7       4.    Upon information and belief, ERSIC admits the allegations in Paragraph 4 of the  
8 Cross-Claim.

9       5.    With respect to Paragraph 5 of the Cross-Claim, upon information and belief,  
10 ERSIC admits that Eyexam is a California corporation. Upon information and belief ERSIC  
11 denies that Eyexam's principal place of business is in Ohio.

12       6.    Upon information and belief, ERSIC admits the allegations in Paragraph 6 of the  
13 Cross-Claim, except to deny that Liberty's principal place of business is unknown.

14       7.    With respect to Paragraph 7 of the Cross-Claim, ERSIC admits that it is a  
15 Connecticut corporation, but denies that its principal place of business is unknown.

16       8.    Upon information and belief, ERSIC admits the allegations in Paragraph 8 of the  
17 Cross-Claim, except to deny that U.S. Fire's principal place of business is unknown.

18       9.    Upon information and belief, ERSIC admits the allegations in Paragraph 9 of the  
19 Cross-Claim, except to deny that Markel American's principal place of business is unknown.

20       10.   ERSIC admits the allegations in Paragraph 10 of the Cross-Claim.

21       11.   Paragraph 11 of the Cross-Claim states a legal conclusion to which no response is  
22 required. To the extent a response is required, ERSIC admits that venue is proper in the Northern  
23 District of California.

24       12.   With respect to the allegations in Paragraph 12 of the Cross-Claim, ERSIC denies  
25 that Westchester fully and accurately sets forth the contents of the complaint in the *Snow* Action,  
26 and as such, denies the allegations.

27       13.   Upon information and belief, ERSIC admits the allegations in Paragraph 13 of the  
28 Cross-Claim.

1       14. The allegations in Paragraph 14 of the Cross-Claim are ambiguous or incomplete,  
2 or purport to characterize Liberty's policies, which terms speak for themselves, and on these  
3 bases, ERSIC denies the allegations in Paragraph 14 of the Cross-Claim.

4       15. With respect to Paragraph 15, ERSIC admits that it issued Managed Care  
5 Organization Errors and Omissions Policy for the November 12, 2001 to November 12, 2002  
6 Policy Period. The remaining allegations in Paragraph 15 of the Cross-Claim are inaccurate,  
7 ambiguous or incomplete, or purport to characterize ERSIC's policy, which terms speak for  
8 themselves, and on these bases, ERSIC denies the remaining allegations in Paragraph 15 of the  
9 Cross-Claim.

10       16. The allegations in Paragraph 16 of the Cross-Claim are ambiguous or incomplete,  
11 or purport to characterize U.S. Fire's policies, which terms speak for themselves, and on these  
12 bases, ERSIC denies the allegations in Paragraph 16 of the Cross-Claim.

13       17. The allegations in Paragraph 17 of the Cross-Claim are ambiguous or incomplete,  
14 or purport to characterize Markel's policy, which terms speak for themselves, and on these bases,  
15 ERSIC denies the allegations in Paragraph 17 of the Cross-Claim.

16       18. The allegations in Paragraph 18 of the Cross-Claim are ambiguous or incomplete,  
17 or purport to characterize Westchester's Policy No. MEA 675648, which terms speak for  
18 themselves, and on these bases, ERSIC denies the allegations in Paragraph 18 of the Cross-Claim.

19       19. The allegations in Paragraph 19 of the Cross-Claim are ambiguous or incomplete,  
20 or purport to characterize Westchester Policy Nos. CUA-150963, CUA-706488, CUW-774410  
21 and CUW-785695, which terms speak for themselves, and on these bases, ERSIC denies the  
22 allegations in Paragraph 19 of the Cross-Claim.

23       20. ERSIC repeats and incorporates its responses to Paragraphs 1-19 of the Cross-  
24 Claim.

25       21. ERSIC admits the allegations in the first sentence of Paragraph 21 of the Cross-  
26 Claim. The remaining allegations in Paragraph 21 of the Cross-Claim purport to describe the  
27 positions taken by and between Westchester and the Plaintiffs, to which no response is required.  
28 To the extent any response is required, ERSIC denies the allegations.

22. ERSIC denies the allegations in Paragraph 22 of the Cross-Claim, including all subparts contained therein.

23. Paragraph 23 of the Cross-Claim purports to describe the relief sought by Westchester, to which no response is required. To the extent any response is required, ERSIC denies the allegations and denies that Westchester is entitled to the relief it seeks

24. ERSIC repeats and incorporates its responses to Paragraphs 1-19 of the Cross-Claim.

25. ERSIC denies the allegations in the first sentence of Paragraph 25 of the Cross-Claim. The remaining allegations in Paragraph 25 purport to describe the relief sought by Westchester, to which no response is required. To the extent any response is required, ERSIC denies the allegations and denies that Westchester is entitled to the relief it seeks

26. Paragraph 26 purports to describe the relief sought by Westchester, to which no response is required. To the extent any response is required, ERSIC denies the allegations and denies that Westchester is entitled to the relief it seeks

27. Each and every allegation of the Cross-Claim not expressly admitted herein is denied.

## **FIRST AFFIRMATIVE DEFENSE**

The Cross-Claim fails to state a claim against ERSIC upon which relief may be granted.

## **SECOND AFFIRMATIVE DEFENSE**

Westchester's claim is barred or limited by operation of ERSIC Policy Endorsement No. 11, which provides that the ERSIC Policy "shall be excess of and shall not contribute with: (a) Commercial General Liability Insurance Policy No RG2-681-004130-031 issued by Liberty Mutual or any renewal or replacement thereof, but only with respect to **Managed Care Activities**; (b) any other existing insurance or self-insurance, unless such other insurance or self-insurance is specifically stated to be in excess of this Policy; and (c) any indemnification to which an **Insured** is entitled from any entity other than the **Insured Entity**."

### **THIRD AFFIRMATIVE DEFENSE**

Westchester's claim is barred or limited because ERSIC's obligation, if any, to indemnify

1 Plaintiffs for the *Snow* Action does not arise unless and until the applicable limits of liability  
 2 available under the underlying Liberty Policies are exhausted.

3 **FOURTH AFFIRMATIVE DEFENSE**

4 Westchester's claim is barred or limited by the doctrines of res judicata, law of the case,  
 5 and/or collateral estoppel, by reason of the findings, orders and judgments entered in the action  
 6 captioned *LensCrafters, Inc., et al. v. Liberty Mut. Fire Ins. Co., et al.*, No. C 04-1001 SBA (N.D.  
 7 Cal.).

8 **FIFTH AFFIRMATIVE DEFENSE**

9 Westchester's claim is barred or limited by the doctrines of equitable contribution and/or  
 10 equitable indemnity.

11 **SIXTH AFFIRMATIVE DEFENSE**

12 Westchester's claim is barred or limited by operation of law holding that ERSIC's duty as  
 13 an excess insurer to indemnify is only triggered once the applicable Liberty Policies are  
 14 exhausted, and then ERSIC's obligation to indemnify, if any, shall be shared equitably with any  
 15 other excess insurers.

16 **SEVENTH AFFIRMATIVE DEFENSE**

17 Westchester's claim against ERSIC is barred or limited to the extent ERSIC's policy  
 18 limits have been depleted or exhausted through the payment of Claims.

19 **EIGHTH AFFIRMATIVE DEFENSE**

20 Westchester's claim is barred or limited by operation of ERSIC Policy Section II(J)(2),  
 21 which excludes coverage for "matters which are uninsurable under applicable law."

22 **NINTH AFFIRMATIVE DEFENSE**

23 Westchester's claim is barred by the doctrines of estoppel and waiver.

24 **TENTH AFFIRMATIVE DEFENSE**

25 Westchester's claim is barred or limited to the extent that Westchester's own action, or the  
 26 actions of any third party, including the defendants in this lawsuit other than ERSIC, diminished  
 27 Westchester's right to the relief sought in the Cross-Claim.

**ELEVENTH AFFIRMATIVE DEFENSE**

Westchester's claims are barred by the doctrine of unclean hands.

**TWELFTH AFFIRMATIVE DEFENSE**

Westchester's claims are barred or limited by operation of ERSIC Policy Section III(A)(1), which excludes coverage for "Loss from any **Claim** brought about or contributed to in fact by: (1) any willful misconduct or dishonest, fraudulent, criminal or malicious act, error or omission by any **Insured**."

**THIRTEENTH AFFIRMATIVE DEFENSE**

Westchester's claims are barred or limited by operation of ERSIC Policy Section III(A)(2), which excludes coverage for "Loss from any **Claim** brought about or contributed to in fact by: ... (2) any willful violation by any **Insured** of any law, statute, ordinance, rule or regulation."

**FOURTEENTH AFFIRMATIVE DEFENSE**

Westchester's claims are barred or limited by operation of ERSIC Policy Section III(A)(3), which excludes coverage for "Loss from any **Claim** brought about or contributed to in fact by: ... (3) any **Insured** gaining any profit, remuneration or advantage to which such **Insured** was not legally entitled."

**FIFTEENTH AFFIRMATIVE DEFENSE**

Westchester's claims are barred or limited by operation of ERSIC Policy Section II(J)(1), which excludes coverage for "fines, penalties, taxes, and punitive, exemplary or multiplied damages."

**SIXTEENTH AFFIRMATIVE DEFENSE**

Westchester's claims are barred or limited by operation of ERSIC Policy Section II(J)(2), which excludes coverage for "non-monetary relief or redress in any form, including without limitation the cost of complying with any injunctive, declaratory or administrative relief."

**SEVENTEENTH AFFIRMATIVE DEFENSE**

Coverage for any "Additional Insureds" is barred or limited by operation of ERSIC Policy Endorsement No. 5, which limits coverage "to any actual or alleged act, error or omission in the

1 performing of, or failure to perform, Managed Care Organization Business Activities by any  
 2 Insured other than an Additional Insured."

3 **EIGHTEENTH AFFIRMATIVE DEFENSE**

4 To the extent that the application or negotiations for the ERSIC Policy included materially  
 5 false, inaccurate, incomplete, or otherwise misleading statements, representations or omissions,  
 6 ERSIC would be entitled to a declaration that the ERSIC Policy is *void ab initio*.

7 **NINETEENTH AFFIRMATIVE DEFENSE**

8 Westchester's claims are barred to the extent it seeks to contribution or allocation of  
 9 amounts within the retention of the ERSIC Policy.

10 **TWENTIETH AFFIRMATIVE DEFENSE**

11 The defenses set forth herein reflect ERSIC's assessment based on the information of  
 12 which ERSIC is currently aware. ERSIC expressly reserves, and does not waive any defenses to  
 13 coverage under applicable law and the Policy, regardless of when such defenses to coverage may  
 14 have arisen or may arise.

15 WHEREFORE, ERSIC prays for judgment as follows:

- 16 1. That the Court declare that Liberty is obligated to indemnify its Insureds for any  
   17 settlement or judgment in the *Snow* Action, and amount of its available limits;
- 18 2. That the Court declare that any obligation of ERSIC to indemnify its Insureds for  
   19 any settlement or judgment in the *Snow* Action is excess to Liberty's duty to  
   20 indemnify under Liberty's applicable policies, and is not triggered unless and until  
   21 the applicable Liberty policy limits are exhausted;
- 22 3. That the Court declare that Westchester, Markel American and U.S. Fire are  
   23 obligated to indemnify their Insureds for any settlement or judgment in the *Snow*  
   24 Action;
- 25 4. That the Court declare that if ERSIC is found to have a duty to indemnify its  
   26 Insureds for any settlement or judgment in the *Snow* Action, that ERSIC is and  
   27 shall be entitled to share equitably in such indemnification with Westchester,  
   28 Markel American and U.S. Fire;

1       5.      That the Court award ERSIC the costs of this litigation; and  
2       6.      For such other and further relief as the Court deems just and proper.

3 Date: September 4, 2007

Respectfully submitted,

4 ROSS, DIXON & BELL, LLP

5 /s/ Terrence R. McInnis

6 Terrence R. McInnis

7 and

8 Monique M. Fuentes  
9 Siavash Daniel Rashtian

10 *Attorneys for Defendant, Counterclaimant, and*  
11 *Cross-Complainant Executive Risk Specialty*  
12 *Insurance Company*

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